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In the Supreme Court of the United States

OCTOBER TERM, 1978

WILSON RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1978. The petition for a writ of certiorari was filed on March 21, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was a prejudicial variance between the conspiracy alleged in the indictment and the proof at trial.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of eight years' imprisonment on the conspiracy count and ten years' imprisonment on the distribution count. He was also sentenced to consecutive special parole terms of three years on each count. The court of appeals affirmed (Pet. App. 13).

The indictment charged that petitioner participated in a conspiracy with co-defendant Levi Leysath and various persons unknown to the grand jury.[1] The illegal agreement allegedly extended from February 1, 1977, to April 14, 1977. The government's evidence at trial showed that, on approximately 10 occasions during this period, Leysath, a heroin user, purchased bags of heroin from petitioner at $40 each, and that he sometimes resold the narcotics at a profit (Tr. 124-133). Leysath paid for the heroin when he received it; he testified that he had no express agreement with petitioner concerning what he would do with the narcotics (Tr. 124, 133). John Holliday, another heroin user, testified that from January through March 1977, he sold heroin for petitioner "[q]uite a few times" and split the proceeds with petitioner. Holliday testified that petitioner talked with him about selling heroin and taught him how to package the heroin for sale (Tr. 152-154, 156-158). On February 12 or 13, 1977,

[1]Before petitioner's trial, Leysath pleaded guilty to a count in the indictment that charged him alone with distributing heroin on March 4, 1977 (Tr. 112).

Holliday received $300 worth of heroin from petitioner, sold part of it, and paid petitioner after making the sale (Tr. 156).

In March 1977, Leysath negotiated with Deputy Sheriff Robert D. Watkins and agreed to sell him a quantity of heroin for $750 (Tr. 25, 55-57). On April 3, 1977, the day before the delivery was to take place, Leysath contacted petitioner to make arrangements to purchase the heroin (Tr. 125-126). The next day, in a parking lot in Columbia, South Carolina, Leysath met with Watkins and DEA Agent James H. Williams. Agent Williams posed as Watkins' associate from Atlanta, Georgia, who was there to finance the transaction. Leysath told the agents that he did not have the heroin and that he needed $300 in advance to obtain the narcotics (Tr. 56, 115). Agent Williams gave Leysath $300 and drove with him and Watkins to a cafe where petitioner worked (Tr. 26, 61, 66). Leysath gave the money to petitioner, who then left the cafe. He returned ten minutes later and told Leysath to accompany him outside. There, within view of the agents, who were waiting in Leysath's car, petitioner pointed to a small boy and told Leysath that the boy was holding the drugs (Tr. 28, 68, 119). Leysath took the heroin from the boy, returned to the automobile, and drove to the parking lot, where he gave the heroin to the law enforcement officers and Agent Williams paid him an additional $350 (Tr. 28-30, 33, 80, 121). (The negotiated price of $750 was apparently reduced to $650 because the heroin was of poor quality.)

Petitioner testified in his own behalf and denied that he had had any heroin dealings with Leysath or Holliday (Tr. 188).

At the close of all the evidence, the district court instructed the jury that, because both petitioner and Leysath denied any agreement between them, there was no evidence of their participation in a conspiracy with each other. However, because the indictment charged a conspiracy involving not only petitioner and Leysath but also persons unknown to the grand jury, the court instructed the jury to decide whether there was an illegal agreement between petitioner and Holliday.[2] Petitioner did not object to this instruction, and the jury returned a guilty verdict on both the conspiracy count and the distribution count.

ARGUMENT

Petitioner argues (Pet. 4-9) that there was a prejudicial variance between the conspiracy alleged in

[2]The court stated (Tr. 199-200):

> Now, in connection with the first count, which is the conspiracy count, I explained conspiracy to you yesterday; which is an agreement, an unlawful agreement, but in connection with this particular Indictment, and the testimony that has been presented, there is no testimony to support the Government's claim that there was a conspiracy between [petitioner] and Levi Leysath, because the testimony of both of those people deny that there was any type of an agreement and the most that could be said, if you took it in the light most favorable to the Government, is that one was a buyer, and the other was a seller. So, that does not prove conspiracy as between [petitioner] and Mr. Leysath. That leaves the question for you to decide under all the evidence in the case, as to whether the Government has proved beyond a reasonable doubt that there was a conspiracy to distribute heroin between [petitioner] and the Witness, Holliday. And we will go into that as to what conspiracy means. But in connection with the first count, I rule, as a matter of law, that there was no conspiracy regarding [petitioner] and Mr. Leysath, but it's for you to decide whether there was a conspiracy between [petitioner] and Mr. Holliday.

the indictment and the proof at trial. The indictment charged petitioner, Leysath, and persons unknown to the grand jury with conspiring to distribute heroin. The proof at trial showed that petitioner sold heroin to Leysath on several occasions during the period alleged in the indictment and that on at least one such occasion Leysath resold a substantial quantity of heroin to law enforcement officers. The proof also showed that petitioner sold heroin to Holliday on a number of occasions during the period alleged in the indictment, that petitioner instructed Holliday on the packaging and resale of the narcotics, and that the two shared the sales proceeds. Petitioner does not dispute that the evidence was sufficient to convict him of conspiring with Holliday. Rather, he contends that, because the district court concluded as a matter of law that Leysath was not part of the conspiracy, the conspiracy count should have been dismissed, even though it alleged that petitioner had conspired with persons other than Leysath.

Even assuming the district court was correct in ruling as a matter of law that Leysath was not one of petitioner's co-conspirators,[3] there was still no variance between the allegations in the indictment and the proof at trial. Before trial, the government announced that it intended to call Holliday as a witness. At the same time, the government released Holliday's pretrial statement to petitioner's counsel (Tr. 2). During

[3]Although we believe the district court erred in instructing the jury that the evidence was insufficient to support the allegation that petitioner and Leysath were co-conspirators, the jury was not permitted to return a guilty verdict based on an illegal agreement involving Leysath, and accordingly we do not defend petitioner's conviction by reference to his dealings with Leysath.

trial, the Assistant United States Attorney plainly stated to the court and defense counsel that Holliday was one of the unknown persons to whom the grand jury referred in the conspiracy count of the indictment; Holliday was not named only because his identity was not known to the grand jury at the time the indictment was filed (Tr. 106). Accepting that the district court's view of the evidence was correct, this establishes nothing more than that the government failed to prove one of the allegations in the indictment; it does not show that the defendant was convicted of a conspiracy different from the one charged.[4]

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[4]A variance occurs when the proof at trial departs from the allegations in the indictment, not simply when the proof establishes some but not all of those allegations. For example, a variance occurs when the indictment charges that an act occurred on one date but the proof shows that it occurred on another. A variance does not occur when the indictment charges that the defendant violated a statute in two different ways but the proof establishes that the defendant violated the statute in only one of those ways. See, *e.g.*, *United States* v. *Abascal*, 564 F. 2d 821, 832-833 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States* v. *Laverick*, 348 F. 2d 708, 714 (3d Cir.), cert. denied, 382 U.S. 940 (1965).

The court of appeals thought, however, that there was a variance between the indictment and the proof at trial, and that petitioner and Holliday engaged in a different conspiracy from the one charged (Pet. App. 13). Assuming *arguendo* that there was a variance in this case,[5] the court of appeals correctly rejected petitioner's claim of prejudice. Petitioner knew before trial that the government intended to call Holliday as a witness. Armed with Holliday's pretrial statement, petitioner's counsel was prepared to and did attack Holliday's testimony concerning events that occurred during the course of the conspiracy. Petitioner did not object to Holliday's testimony or to the court's instruction to the jury that it could return a guilty verdict if it found that petitioner and Holliday were co-conspirators. Under these circumstances, the court of appeals correctly sustained petitioner's conspiracy conviction.

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[5]Petitioner apparently does not argue that the indictment charged two separate conspiracies, one with Leysath and one with Holliday, in the same count and was therefore duplicitous. Such an objection would be unavailing in any event, because the district court instructed the jury that it could not convict petitioner of an illegal agreement with Leysath. As the conspiracy count was submitted to the jury, therefore, only the agreement with Holliday was at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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